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WM. R. STANS

No. [redacted] 326

Supreme Court of the United States,

OCTOBER TERM, 1[redacted] 1925

MORSE DRY DOCK & REPAIR COMPANY,
Petitioner,

—against—

Steamship "NORTHERN STAR," her engines, etc.,
HARRY LUBER,
Intervening Petitioner, Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

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The petitioner seeks to obtain a review by this Court of a final decision of the Circuit Court of Appeals for the Second Circuit, which affirmed a decision in admiralty of the District Court for the Eastern District of New York granting the respondent full recovery on his intervening petition as the holder of a preferred mortgage against the Steamship "Northern Star," on the ground that the respondent's claim was prior to the claim of the petitioner for repairs to the Steamship "Northern Star."

The Facts.

The opinion of the Circuit Court of Appeals concisely states the facts of the case, and its statement of facts is quoted as follows, since the petitioner's statement contains some variations from it:

> "The vessel was a former government owned ship and was sold to the American Star Line Inc.

on August 9, 1920. The latter gave the United States of America a preferred mortgage and ten promissory notes in amount of $1,217,437.50, covering the balance due on the purchase price. The bill of sale of (and) the mortgage was (were) recorded at the Custom House at the Port of New York on August 11, 1920. When so given, the 'Northern Star' was at sea. Upon its return to an American port, a certified copy of the mortgage was placed on board the vessel and kept with the ship's papers continuously from September 23, 1920. But the Collector of Customs did not endorse the mortgage upon the ship's papers until June 27, 1921. The appellant, between November 14th and November 27th, 1920, at the request of the American Star Line Inc., furnished repairs to the steamship at the Port of New York in the amount for which this libel is filed. On December 22, 1920, receivers were appointed for the American Star Line Inc., a New York corporation, because of defaults in this agreement of sale and the preferred mortgage. On August 4, 1923, the intervenor-appellee purchased the mortgage of the United States for $117,000. On August 2, 1923, the District Court entered an order permitting all persons claiming any interest in the 'Northern Star' to file libels against the vessel and prosecute the same to the satisfaction thereof."

The words in parentheses are interpolated for greater clarity.

The Sole Issue.

Although the petition sets forth two propositions, the second really begs the question raised by the first; for, to quote the opinion of the Circuit Court of Appeals "if the mortgage be a preferred one, the lien of the appellant (petitioner) is junior to that of the mortgage lien."

Therefore the sole question raised by the petition is:

Was the mortgage of the United States on the Steamship "Northern Star" a preferred mortgage at the time the claim of the petitioner accrued?

The petitioner contended in both the District Court and on its appeal to the Circuit Court of Appeals that the mortgage did not acquire preferred status until June 27, 1921, by reason of the failure of the Collector of Customs to endorse the mortgage on the ship's papers until that date. The respondent contended in both the District Court and in the Circuit Court of Appeals that since all the steps within the power of the mortgagor or mortgagee had been taken, the mortgage acquired preferred status before the petitioner's claim for repairs arose. The mortgage had been recorded on August 11, 1920, and a certified copy of it had been placed on board the vessel, and kept with the ship's papers continuously from September 23, 1920. Consequently, the preferred status of the mortgage was not dependent upon the endorsement by the Collector of Customs.

Both the District Court and the Circuit Court of Appeals sustained the respondent's contention and held that the mortgage was a preferred mortgage at the time the petitioner's claim arose.

In passing upon this question, the District Court said:

> "Libellant claims that the said mortgage held by Harry Luber was not a preferred mortgage at the time that libellant made the repairs to said steamship because it was not endorsed on the ship's papers.
>
> So much of the law in force at the time libellant made such repairs to said steamship as is necessary for consideration in the instant case reads as follows:
>
> 'Section 30, Ship Mortgage Act 1920, 41 Stat. L. 1,000:

Subsection C. (a) No sale, conveyance, or mortgage which, at the time such sale, conveyance, or mortgage is made, include a vessel of the United States, or any portion thereof, as the whole or any part of the vessel sold, conveyed, or mortgaged shall be valid, in respect to such vessel, against any persons other than the grantor or mortgagor, his heir or devisee, and a person having actual notice thereof, until such bill of sale, conveyance, or mortgage is recorded in the office of the collector of customs of the port of documentation of such vessel, as provided in subdivision (b) of this subsection.

Subsection D. (a) A valid mortgage which, at the time it is made includes the whole of any vessel of the United States of 200 gross tons and upwards, shall in addition have, in respect to such vessel and as of the date of the compliance with all the provisions of this subdivision, the preferred status given by the provisions of subsection M, if—

(b) Any mortgage which complies in respect to any vessel with the conditions enumerated in this subsection is hereafter in this section called a "preferred mortgage" as to such vessel.

(c) There shall be endorsed upon the documents of a vessel covered by a preferred mortgage—

(d) Such endorsement shall be made (1) by the collector of customs of the port of documentation of the mortgaged vessel, or (2) by the collector of customs of any port in which the vessel is found, if such collector is directed to make the endorsement by the collector of customs of the port of documentation; and no clearance shall be issued to the vessel until such endorsement is made. The collector of customs of the port of documentation shall give such direction by wire or letter at the request of the mortgagee and upon the tender of the cost of communica-

tion of such direction. Whenever any new document is issued for the vessel such endorsement shall be transferred to and endorsed upon the new document by the collector of customs.

Subsection E. The collector of customs upon the recording of a preferred mortgage shall deliver two certified copies thereof to the mortgagor who shall place, and use due diligence to retain, one copy on board the mortgaged vessel and cause such copy and the documents of the vessel to be exhibited by the master to any person having business with the vessel, which may give rise to a maritime lien upon the vessel or to the sale, conveyance, or mortgage thereof. The master of the vessel shall, upon the request of any such person, exhibit to him the documents of the vessel and the copy of any preferred mortgage of the vessel placed on board thereof.'

The duty of endorsing the fact of the existence of the mortgage on the ship's papers is placed upon the Collector and not upon the mortgagor or mortgagee and must be done by the Collector of the home port of the vessel but if at that time she is in any other port of the United States, the endorsement may be made by the Collector of that port upon direction of the Collector of the vessel's home port, but that provision has no application in the instant case because the vessel at the time of the recording of the mortgage was on the high seas and no endorsement could have been made until her return to the United States.

The first port at which the said vessel was cleared after the recording of the mortgage was the port of New York, its home port, and it was the duty of the Collector to have made such endorsement when said vessel cleared on September 22, 1920.

The endorsement on the ship's papers could not be made by the mortgagee, and therefore if the failure of the Collector to make such endorse-

ment be held to deprive the mortgage of its status as a preferred mortgage the whole purpose of Congress would fail.

That Congress realized that this situation might arise appears as the reading of the Act continues, and in construing any part of Section 30 it is necessary to construe it as a whole and therefore it did not intend to penalize the mortgagee for any failure of the collector to perform his duty, but place the penalty on him (see subsection J) (c):

> 'If any person enters into any contract secured by, or upon the credit of, a vessel of the United States covered by a preferred mortgage, and suffers pecuniary loss * * *'

What did the libellant lose by the failure of the Collector to make the endorsement?

The mortgage was recorded in the same city where the libellant had its place of business, a certified copy was on the ship, and surely more information could be gained from an examination of the copy than from any endorsement on the ship's papers.

Bark Moshulu, 1923 A. M. C. 1091.

If the libellant suffered any loss he could recover the same from the Collector of the Port (Subsection J) (c) *supra*.

I therefore am of the opinion that the provision for endorsing the fact of the mortgage on the ship's papers is directory, not mandatory, and the mortgage in question had a preferred status from the date it was recorded, August 11, 1920.

The Nanking, 1923 A. M. C. 1191."

The petitioner appealed from this decision to the Circuit Court of Appeals which affirmed the decision

of the District Court, although it differed with the lower Court on the question whether the petitioner had a maritime lien in the first instance. In affirming the District Court's decision that the mortgage had acquired preferred status when the petitioner's claim accrued, the Circuit Court of Appeals said:

> "* * * The appellant attacks the validity of the mortgage as a preferred mortgage, contending that the failure to endorse it on the ship's papers before June 27th, 1921, made it invalid prior thereto as such preferred status. It had been recorded in the Custom House on August 11, 1920, and a certified copy placed on the vessel on September 28, 1920. The failure to endorse the mortgage on the ship's papers was the failure of the Collector of Customs. The Act provides for the endorsement of the mortgage on the ship's papers and Sub. Div. M provides that a lien arising prior in time to the recording and endorsement of a preferred mortgage, is a preferred maritime lien, but these provisions must be interpreted in the light of the whole statute. Sub. Div. D provides that such endorsement shall be made by the Collector of Customs at the port of documentation of the mortgaged vessel or upon request of the mortgagee by the Collector of Customs at the port where the vessel may be found. It will be noted that the duty is imposed upon the Collector of Customs. When a vessel is not at her home port, the Collector of Customs at that port cannot make the endorsements on the papers and the endorsement apparently must be made in an American port. Therefore, such recordation may not be made on an American vessel which happens to be plying between foreign ports. But it evidently was the intention of the Ship Mortgage Act to protect the mortgagee even under such circumstances. That the Act places very strongly upon the Collector of Customs, the duty of making the endorsement, is indicated by

Sub. Div. D which provides, 'and no clearance shall be issued to the vessel until such indorsement is made.' Sub. Div. J renders the Collector of Customs liable to persons entering into any contract on the credit of the vessel who have suffered any damage as a result of the Collector's failure to perform any duty required of him under the Act. These sections indicate that it was not intended by Congress to penalize a mortgagee for the failure of the Collector of Customs to perform his duty, but placed the responsibility on the Collector. Furthermore, liability of the mortgagor for any damage to third parties resulting from any failure upon the mortgagor's part, is provided for, and no mention is made of liability on the part of the mortgagee. It was pointed out in *The Egeria* (294 Fed. 791), that such endorsement of the mortgage was a matter with which the mortgagee had nothing to do; that it was the duty of the Collector of Customs to make the endorsement and the presumption would be, until the contrary was shown, that the Collector duly performed his duty and if there was a failure of allegation in this respect, the remedy was to except to the libel, for the defect was one which might have been cured by amendment. The mortgagee, in the nature of things, has no control over the mortgagor or the Collector of Customs, and the Act indicates that it is not contemplated that the mortgage be invalid by reason of the failure of indorsement by the Collector. It is the intention of the Ship Mortgage Act to protect the mortgagee, not to penalize him for the failure of a government official to comply with the provisions of the Act. All was done here that could be done by the recordation of the mortgage, the placing of it among the papers of the ship, and the delay of the Collector of Customs in making the endorsement, to some extent excused by reason of the fact that the vessel was on the high seas, will not invalidate this mortgage as a preferred mortgage. (*The Nanking*, 1923 A. M. C. 1191,

Dist. Ct. No. Dis. of Calif.; *The Oconee*, 280 Fed. 927; *The Oswego*, 292 Fed. 403.) The purpose of such an endorsement manifestly is to give notice to persons having dealings with the vessel that there is a preferred mortgage upon it. Such notice was amply given by the record of August 11, 1920, in the Custom House and filing a certified copy on board the vessel with its papers on September 23, 1920. Reasonable care and diligence by way of investigation, would have given the appellant knowledge of the mortgage and its terms before the repairs were made in November, 1920. (*United States* v. *Carver*, 260 U. S. 482; *The Princess Matoika*, 1924 A. M. C. 1033; *The Mossabee*, 1923 A. M. C. 874, C. C. A. 4th Circuit; *The Susanna*, 2 (2nd) Fed. 410.)"

The Decisions of the Point Are Uniform.

Although the petitioner seeks to convey the impression that there is a divergence of opinion on the sole point raised by it, the fact is that the decisions of the various courts uniformly support the conclusions reached by the District Court and the Circuit Court of Appeals in the case at bar.

In the first place, a similar holding was made by the District Court for the Northern District of California on August 20, 1923, in *The Nanking*, 292 Fed. 641, 1923 A. M. C. 1191. In that case, Judge Partridge, speaking of the effect of the endorsement said at pages 1202 and 1203:

> "Next, that this provision of the mortgage was not and is not endorsed upon the vessels' documents as required by subdivision (1), (c) (4) and (e) of subsection 'D' of said Section 30, in that while said purported mortgage or deed of trust included property other than the vessel,

to wit, forty-eight hundred and fifty shares of the capital stock of China Pacific Steamship Company, Limited, and so forth, no endorsement was made upon the vessels documents of a specified portion of the mortgage indebtedness.

I would be loath, indeed, to decide that people who had, in good faith, invested three-quarters of a million dollars upon both these vessels and other vessels mortgaged should be denied their right to get such of their money as they can out of the proceeds, by any strained constructions of the Act. I would be particularly loath to do that for the reason that at the time this mortgage or deed of trust was prepared the Ship Mortgage Act was a new thing. As I remember it, this mortgage was prepared within a few weeks or at most, within a month or two after the Ship Mortgage Act became a law.

But aside from that I am convinced that the provision of the Ship Mortgage Act for the endorsement upon the papers of the vessel is merely directory and failure to do so does not make the mortgage void * * *.

The exceptions, therefore, or so much of the exceptions to the answers as go to the constitutionality of the Act and the allegation that the mortgage in this particular case is void as it does not conform to the Act, will be sustained without leave to amend."

It will be noted that in the *Nanking* "the mortgage was not and is not endorsed upon the vessels' documents," whereas in the case at bar, the endorsement was made upon the ship's papers on June 27, 1921. Consequently the Court's holding in that case goes even farther than the decisions of the District Court and the Circuit Court of Appeals in the case at bar.

In *The Nanking*, the Court viewed as a strained construction of the Ship Mortgage Act the contention that

endorsement was necessary for the preferred status of a mortgage.

The foregoing interpretation is supported by a more recent decision of the Circuit Court of Appeals for the Ninth Circuit, *The Egeria* (C. C. A., 9th Circ., Dec. 17, 1923, rehearing denied Feb. 11, 1924), 294 Fed. 791. In that case, Judge Gilbert, writing the opinion for the Court, said at pages 792 and 793:

> "The copy of the mortgage filed as an exhibit to the libel contained the requisite affidavit, and while it is true that *the libel failed to allege that the mortgage was indorsed upon the ship's documents*, the absence of such an allegation is believed to be immaterial. *Such indorsement of the mortgage was a matter with which the mortgagee had nothing to do. It was the duty of the collector of customs to make the indorsement*, and the presumption would be, until the contrary were shown, that the collector duly performed his duty. And if indeed there was failure of allegation in that respect the remedy of the appellants was to except to the libel, the defect being one which might have been cured by amendment. *In line with our view of the statute are the decisions in the Oconee* (D. C. 280 Fed. 927, *and The Owego* (D. C.) 292 Fed. 403, *holding that the statute is remedial and should be liberally construed.* In *The Oconee* case the Court said:
>
> > *'The statute itself nowhere seems to contemplate any default on the part of the mortgagee for the failure of compliance with those sections of the act to be performed by the mortgagor and the master.* The mortgagor * * * is subjected to a penalty if he fails to deliver on board the ship a copy of the mortgage. The master is likewise subject to a penalty if he fails to exhibit the same when called upon. *The mortgagee, in the nature of things, has no control over either, and the act clearly does not con-*

template the invalidity of the mortgage by reason of such failure on their part.'"

In the case at bar, the mortgage was on record at the Custom House in New York continuously from August 11, 1920, and there was a certified copy of it on the vessel with the ship's papers from September 23, 1920, long before the endorsement was made by the Collector of Customs on June 27, 1921. The repairs for which the petitioner brought suit were made after September 23, 1920; in fact, between November 14th and November 27, 1920.

Moreover, the repairs were made at the Port of New York by a New York corporation upon a ship whose home port was New York and which was owned by a New York corporation. Both the ship repairer and the shipowner had their principal offices in New York City (fols. 6, 21, 56, 111 of Record).

Consequently the petitioner must have known or certainly could have known by the exercise of the slightest diligence that there was a preferred mortgage on the vessel, which would come ahead of its claim in any event. A certified copy of the mortgage giving all its provisions was available to the petitioner on board the ship all the while it was making the repairs to the vessel.

In addition the mortgage was available for examination at the Custom House in the Port of New York where it was recorded, and at the office of the American Star Line, Inc., which owned the "Northern Star."

A certified copy of the mortgage itself which was with the ship's papers is certainly better notice than a brief endorsement on the papers saying that such a mortgage exists. The petitioner cannot say it was prejudiced by lack of endorsement until June 27, 1921, for, if it had asked for the ship's papers, it would have found the mortgage with them. It was bound by law to

make reasonable and diligent inquiry as to whether it could have a lien on the ship and the slightest inquiry, either on board the vessel or at the Custom House or at the office of the American Star Line, Inc., would have shown it that there was a preferred mortgage on the "Northern Star."

Consequently, with a certified copy of the mortgage on board the ship, the endorsement was for all practical purposes absolutely immaterial. In these circumstances, it would be an especially artificial interpretation to say that the endorsement was necessary to give the mortgage preferred status.

The effect of having a certified copy of the mortgage on board the steamer is well stated by Judge Dooling in the recent case of the *Bark Moshulu* (N. D. Cal., Oct. 10, 1923), 298 Fed. 348, as follows:

> "* * * The endorsement of the preferred mortgage claim may work an apparent hardship to the other lien claimant, but *it is to be noted that a certified copy of the mortgage was on board the vessel subject to examination by* any person having business with the vessel which might give rise to a maritime lien and that the master was bound to exhibit to any such person the documents of the vessel and such copy (subsection E, Act June 5th, 1920). *So that claimants had ample opportunity to know that any claim on their part for services rendered the vessel would be subordinate to the lien of the mortgage.*"

In its endeavor to give the impression that there is a divergence of Court decisions, the petitioner quotes from the District Court's opinion in the *Northern Wave*, 298 Fed. 188, and refers to the *Bethlehem*, 286 Fed. 400. As a matter of fact, these cases did not in any way pass upon the preferred status of a mortgage, but the princi-

pal question involved in them was the libellant's right to any maritime lien.

Both the *Bethlehem* and the *Northern Wave* were heard together on appeal and were considered in one decision of the Circuit Court of Appeals rendered February 15, 1925. *Bethlehem-Northern Wave* (C. C. A., 3rd Circ.), 1925 A. M. C. 569. The questions raised were stated by the Court of Appeals at page 572 as follows:

> "The main questions arising from the whole transaction are, first whether libellants for supplies and repairs used such diligence to find the agreements of purchase and the mortgages, which contained covenants denying the owner the right to incur liens upon the ships, as would entitle them to maritime liens under the Act of 1920; and, secondly, if they did, whether the decrees *pro confesso* are subject to collateral attack and to be set aside by orders of reference to a commissioner more than four months after the date of the decrees and by renewed orders of reference made about two years thereafter, there being no question of fraud or of the lack of the court's jurisdiction."

It will be noted, therefore, that the preferred status of the mortgage was not a question before the Court.

Moreover, the Appellate Court's statement of facts at page 571 shows that those cases differed materially from the case at bar in that copies of the mortgages were not carried with the ships' papers.

> "On November 20, 1920, agreements of sale of the ships were executed as of October 22, 1920, the date the ships were delivered. The purchaser also executed mortgages against the ships covering the deferred payments which were recorded at Baltimore, Maryland, the home port, on November 20, but endorsement of the mortgages on the ship's

> documents was not made until January 14, 1921, *nor were copies of the mortgages carried on the ships,* as required by the Ship Mortgage Act of 1920 to give them the status of preferred mortgages."

Consequently, there is no divergence of Court opinions, but, on the contrary, those Courts which have passed upon the sole question raised by the petition in the case at bar have uniformly sustained the views of the District Court and the Circuit Court of Appeals in *Morse Dry Dock v. Northern Star.*

The District Court and the Circuit Court of Appeals having both held that the mortgage on the "Northern Star" had preferred status before the petitioner's claim arose and the decisions of the courts in the other circuits being in conformity with that holding, the petition should be denied.

Respectfully submitted,

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New York, N. Y., April 10, 1925.